Standard Chartered Bank v Asia Transport Service (M) Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — (COMMERCIAL DIVISION) D2-22-1362-93
RICHARD TALALLA J
24 JULY 1995

Civil Procedure *— Parties — Substitution of plaintiff — Foreign bank transfer business together with rights and power of taking or resisting legal proceedings to local bank — Whether foreign and local bank had locus standi to make joint application to court to substitute local bank as plainitff in an action against defendant — Whether local bank was in intervener — Banking and Financial Institutions Act 1989 s 50(1) — Rules of High Court 1980 O 15 r 6(2)(b)(ii) & 7(2)*

Pursuant to the provisions of the Banking and Financial Institutions Act 1989 ('the Act'), Standard Chartered Bank ('the appellant') entered into an agreement to sell its business to the Standard Chartered Bank Malaysia Bhd ('the Malaysian bank'). Pursuant to s 50(1) of the Act, the appellant and the Malaysian bank subsequently applied for a court order ('the order') which provided that the Malaysian bank would have the same rights and powers as to commencing and defending legal proceedings by or against the appellant. The court granted the order. On 26 October 1994, the appellant and the Malaysian bank made a joint application to the court for another order that the Malaysian bank be substituted as the plaintiff in an action against the respondent ('the application'). However, the respondent argued that: (i) the appellant which had divested itself of all its rights, had no locus standi to bring the application; (ii) the Malaysian bank which was not a party to the action had no locus standi to bring the application; (iii) the Malaysian bank should first have applied for leave of the court pursuant to O 15 r 6(2)(b)(ii) of the Rules of High Court 1980 ('the RHC') to intervene in this action before applying to be substituted as plaintiff. The deputy registrar decided in favour of the respondent. The appellant appealed.

Held, allowing the appeal in part:

(1) The provisions of the Act having been complied with, and in consequence of the order, the business and rights of the appellant including the right to proceed with the action had to be taken to have been transferred to the Malaysian bank with effect from the transfer date of the business (see p 161E).

(2) The appellant ceased to have any rights or interest in its business as from the transfer date. But the appellant had an interest and a right at all times to protect itself from liability arising from the consequences of such transfer. Such a liability could arise in the realm of costs, as long as the appellant remained a plaintiff in the

action. Therefore, the appellant had a right to take all proper steps immediately to remove itself as plaintiff in the proceedings. It follows that the appellant did have locus standi to bring the application. There was nothing wrong in the appellant and the Malaysian bank making the application jointly (see p 164D–E).

(3) The Malaysian bank was seeking not merely to be added as a party or to intervene, but to be plaintiff in the action. Accordingly, the Malaysian bank had to make an application under O 15 r 7(2) of the RHC for an order that the proceedings be carried on as if the Malaysian bank had been substituted for the plainitff (see p 163H).

(4) The application insofar as it was brought by the Malaysian bank was to remain dismissed with costs. Insofar as the application was brought by the appellant, the registrar's order was to be set aside to the extent that the order constitutes a dismissal of the appellant's application for leave to amend the writ, that Standard Chartered Bank Malaysia Bhd be substituted for the plaintiff (see p 164G).

[Bahasa Malaysia summary

Mengikut peruntukan Akta Bank dan Institusi-Institusi Kewangan 1989 ('Akta tersebut'), Standard Chartered Bank ('perayu') telah mengikat suatu perjanjian untuk menjual perniagaannya kepada Standard Chartered Bank Malaysia Bhd ('bank Malaysia'). Menurut s 50(1) Akta tersebut, perayu dan bank Malaysia kemudiannya telah membuat suatu perintah mahkamah ('perintah tersebut') yang menyatakan bahawa bank Malaysia akan mempunyai hak dan kuasa yang sama dengan perayu dalam memulakan ataupun membela dalam prosiding undang-undang. Pada 26 Oktober 1994, perayu dan bank Malaysia telah memohon secara bersama kepada mahkamah untuk suatu perintah lagi supaya bank Malaysia digantikan sebagai plaintif dalam suatu tindakan terhadap penentang ('permohonan tersebut'). Walau bagaimanapun, penentang berhujah bahawa: (i) perayu yang telah melucutkan kesemua haknya, tidak mempunyai locus standi untuk membuat permohonan itu; (ii) bank Malaysia yang bukan merupakan suatu pihak kepada tindakan yang berkenaan itu tidak mempunyai locus standi untuk membuat permohonan itu; dan (iii) bank Malaysia harus memohon kebenaran mahkamah mengikut A 15 k 6(2)(b)(ii) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') terlebih dahulu untuk mencelah dalam tindakan sebelum memohon untuk digantikan sebagai plaintif. Penolong kanan pendaftar membuat keputusan yang memihak kepada penentang. Perayu merayu.

Diputuskan, membenarkan sebahagian daripada rayuan itu:

(1) Oleh kerana peruntukan Akta tersebut telah diikuti dan perintah tersebut telah dibuat, perniagaan dah hak perayu termasuk hak untuk meneruskan tindakan yang berkenaan harus dianggap

A sebagai dipindahkan kepada bank Malaysia, mulai dari tarikh pindahmilik (lihat ms 161E).

(2) Perayu tidak lagi mempunyai sebarang hak atau kepentingan dalam perniagaannya mulai dari tarikh pindahmilik. Walau bagaimanapun, perayu mempunyai kepentingan dan hak pada
B semua masa untuk melindungi diri sendirinya daripada liabiliti yang disebabkan oleh pindahmilik tersebut. Liabiliti tersebut boleh timbul dalam perkara kos, jika perayu tetap menjadi seorang plaintif dalam sesuatu tindakan. Maka, perayu berhak untuk mengambil kesemua langkah yang wajar untuk menyingkirkan dirinya sebagai seorang plaintif dalam prosiding. Ekoran itu,
C perayu mempunyai locus standi untuk membuat permohonan tersebut. Tidak apa-apa yang tidak betul jika perayu dan bank Malaysia membuat permohonan bersama (lihat ms 164D–E).

(3) Bank Malaysia memohon, bukan sahaja untuk ditambahkan sebagai suatu pihak atau untuk mencelah, tetapi untuk menjadi
D seorang plaintif dalam tindakan. Oleh yang demikian, bank Malaysia harus membuat permohonan di bawah A 15 k 7(2) KMT untuk suatu perintah supaya prosiding itu dijalankan seolah-olah oleh bank Malaysia yang telah digantikan sebagai plaintif (lihat ms 163H).

E (4) Permohonan yang dibuat oleh bank Malaysia tetap ditolak dengan kos. Walau bagaimanapun, berkenaan dengan permohonan yang dibuat oleh perayu, perintah pendaftar adalah diketepikan setakat mana perintah tersebut merupakan suatu penolakan permohonan perayu untuk kebenaran untuk meminda writ supaya Standard
F Chartered Bank Malaysia Bhd digantikan sebagai plaintif (lihat ms 164G).]

Notes

For cases on parties, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2362–2498.

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Cases referred to

Mercer Alloys Corp & Anor v Rolls Royce Ltd [1972] 1 All ER 211; [1971] 1 WLR 1520

Tohtonku Sdn Bhd v Superace (M) Sdn Bhd [1989] 2 MLJ 298

H *Toprak Enerji Sanyi AS v Sale Tilney Technology P/C* [1994] 3 All ER 483; [1994] 1 WLR 840

United Asian Bank Bhd v Personal Representatives of Roshammah (decd) & Ors [1994] 3 MLJ 327

I **Legislation referred to**

Banking Act 1973

Banking and Financial Institutions Act 1989 ss 1, 2(1), 4, 6(4), 49, 50, 50(1), (3), 128(1), 129(1)(a), (3)

Companies Act 1965
Courts of Judicature Act 1964 ss 16, 17
Rules of the High Court 1980 O 15 rr 6(2)(b)(ii), 7(2)

WM Chang (*Raja, Darryl & Loh*) for the plaintiff.
Joy Appukuttan (*Wang Kuo Shing & Co*) for the third defendant.

Richard Talalla J: This is an appeal against the decision of the learned deputy registrar ('the registrar') made on 26 October 1994 dismissing the joint application (the application) of the plaintiff ('the English bank') and Standard Chartered Bank Malaysia Bhd ('the Malaysian bank') for an order that the Malaysian bank be substituted as the plaintiff in this action.

In the previous decade, the government instituted a policy that all foreign banks intending to conduct banking business in Malaysia must be locally incorporated within five years. The policy metamorphosed into the Banking and Financial Institutions Act 1989 ('the Act'). Hereafter, all references to sections, subsections and paragraphs are to those of the Act. Section 4 forbids any person to carry on, inter alia, banking business unless it is a corporation and holds a valid licence granted under sub-s 6(4) to carry on such business. Under sub-s 128(1), the Banking Act 1973 was repealed. The licence of the English bank to carry on banking business was granted under the repealed Act. However, para 129(1)(a) provided for it to be deemed to be a licence granted under sub-s 6(4) but, being a bank established outside Malaysia (a foreign bank), to remain valid for a period of five years from the effective date, the effective date being defined in sub-s 2(1) as the relevant date or dates, as the case may be, notified by the minister under s 1. Subsection 129(3) provides for the surrender of such a licence before the expiry of the said period and if before such surrender the holder has, subject to s 49, transferred its property business and liabilities to a public company having the meaning assigned thereto by the Companies Act 1965, such public company shall, upon application to the minister and surrender of such licence by the holder, be granted a licence under sub-s 6(4), with or without conditions, to carry on banking business. Section 49 provides for a proposed agreement or arrangement to transfer such business to be in writing and approved by the minister upon the parties applying to him in writing for the same. Upon receiving such approval, the foreign bank and the said public company may make a joint application to the High Court pursuant to s 50 for such order as may be required to facilitate or enable the transfer agreement being given effect to.

In accordance with the provisions of the Act, the English bank took the following steps, to wit, the Malaysian bank was incorporated and the English bank as vendor and the Malaysian bank as purchaser entered into a sale and purchase agreement ('the sale agreement') which was duly approved by the minister. Clause 3 of the sale agreement provided for the sale of the business of the English bank to the Malaysian bank. The said business was to include all securities as well as all the rights, powers and remedies of the English bank, and in particular the rights and powers as to taking or resisting legal proceedings. By way of a joint application made by

A the English bank and the Malaysian bank by ex parte originating summons pursuant to s 50(1) of the Act, the court made an order ('the order'). The effective date of the sale and transfer of the said business to the Malaysian bank ('the transfer date') was, as stated in the sale agreement, ordered therein to be 1 July 1994.

B The order provided that as from the transfer date, any existing instrument of the English bank would be construed and enforced as if reference to the English bank therein be substituted with a reference to the Malaysian bank. The order further provided that as from the transfer date, the Malaysian bank would have the same rights and powers as to commencing and defending legal proceedings for ensuring, preserving or C enforcing a right as if at all times it had been a right of the Malaysian bank, including those rights in respect of any legal proceedings pending immediately before the transfer date by or against the English bank. Section 50(3) stipulates that an order under sub-s (1) shall have effect according to its terms, notwithstanding anything in any law or in any rule D of law, and shall be binding on any person thereby affected, regardless that the person so affected is not a party to the proceedings under that section or any other related proceedings, or had no notice of the proceedings under that section or of other related proceedings.

The provisions of the Act having been complied with, and in consequence the said order having been made, the business and rights of E the English bank including the right to proceed with this action had to be taken to have been transferred to the Malaysian bank with effect from the transfer date.

Order 15 r 7(2) of the Rules of the High Court 1980 ('the Rules') was relied on to support the application. That rule provides as follows:

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> Where at any stage of the proceedings in any cause or matter the interest or liability of any party is assigned or transmitted to or devolves upon some other person, the Court may, if it thinks it necessary in order to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, order that other person to be made a G party to the cause or matter and the proceedings to be carried on as if he had been substituted for the first mentioned party.

The registrar dismissed the application on grounds, inter alia, firstly, that the Malaysian bank had no locus standi to bring the application, the Malaysian bank not being a party to the action, and secondly, that the H English bank having divested itself of all its rights including its rights in this action, the English bank had no locus standi to bring the application and indeed in respect of the whole action. The English bank being aggrieved by the decision of the registrar brought this appeal.

The argument of the third defendant, who is the only respondent to this appeal, was the same as that argued before the registrar, namely, that I the English bank ceased to have further rights in this action from the transfer date, and therefore was not in a position to pursue the application, that the Malaysian bank was not a party to this action, hence it was not in a position to make the application, and that the Malaysian bank should

first have applied for leave of this court pursuant to O 15 r 6(2)(b)(ii) of the Rules to intervene in this action before applying to be substituted as the plaintiff in this action.

Counsel for the respondent emphasized that he was not disputing the order or the right of the Malaysian bank to be substituted as the plaintiff, but only the procedure to be followed to the end that the Malaysian bank be substituted as the plaintiff. In arguing for intervention proceedings pursuant to the rule last referred to, counsel for the respondent relied on the cases of *Tohtonku Sdn Bhd v Superace (M) Sdn Bhd* [1989] 2 MLJ 298 and *United Asian Bank Bhd v Personal representative of Roshammah (decd) & Ors* [1994] 3 MLJ 327.

Counsel for the appellant had earlier relied on two authorities, namely, *Toprak Enerji Sanyi AS v Sale Tilney Technology plc* [1994] 3 All ER 483; [1994] 1 WLR 840 and *Mercer Alloys Corp & Anor v Rolls Royce Ltd* [1972] 1 All ER 211; [1971] 1 WLR 1520. In the former case, the facts were that the defendant company entered into a contract with the plaintiff company, E, which was incorporated in Turkey, to supply machinery and equipment for installation in a plant manufacturing fluorescent light fittings, which E had agreed to establish in Turkey. Legal proceedings were commenced by E against the defendant for breach of the aforesaid contract in August 1990. Later that year E merged with and was absorbed by a sister company, SR, which subsequently merged with another company, SN, belonging to the same group, such that the effect of the mergers under Turkish law was that, by reason of the doctrine of universal succession, E ceased to exist and all its assets and liabilities, including the right to bring proceedings against the defendant, were transferred, first to SR and then to SN. Following the mergers, SN applied for leave under O 15 r 7 of the Rules to be substituted for E as plaintiff in the action. The court held that on the facts, it was evident that the substitution of SN was clearly necessary for the determination of the action, that the defendant would suffer no prejudice by reason of the substitution, and that the court would accordingly order that SN be substituted as plaintiff in the action pursuant to O 15 r 7(2). Counsel for the respondent sought to distinguish *Toprak*'s case, arguing that in that case, the issue that a party must first obtain leave to intervene was not raised, that in the instant case, the English bank and the Malaysian bank are existing entities, whereas the merger of E with SN had led to the cessation of existence of E altogether, and that in that case the application was made by SN whereas the appeal here is only pursued by the English bank who, as counsel reiterated, had no further interest in this matter. In the *Mercer* case, two California companies Mercer and Stalco issued a writ in April 1970 against the defendant. In July 1970, unknown to the defendant, Stalco merged with another Californian company, Whittaker. From that date, according to California law Stalco, while ceasing to exist as a separate corporate entity, continued to exist for the purpose of pending suits. Consent judgment was recorded in February 1971 and the defendant subsequently, having learnt of the merger sought to set aside the judgment on the ground that since at the material date Stalco had ceased to exist, the judgment was null and void. The plaintiffs applied to amend

A the title of the action by substituting Whittaker as the second plaintiff. Counsel for the respondent sought also to distinguish *Mercer*'s case, arguing that in that case again, the issue that a party must first obtain leave to intervene was not raised. The application was made by the plaintiffs who had locus standi to make such an application to substitute the parties, whereas here, counsel persisted, the English bank had no such right. The B court there held that it had the power both under rules of court, that is to say O 15 rr 6(2) and 7(2) of the RSC, and by virtue of its inherent jurisdiction to make such an order after judgment in certain circumstances, and in the circumstances, it was right and proper and in the interests of justice for the court to order the amendment, since at the time of the C settlement it had been the intention of the parties to put an end to the litigation between them and the amendment would give effect to that intention.

As to whether counsel for the defendant is right in saying that the Malaysian bank should have applied for an order for leave to intervene in D these proceedings, it has to be borne in mind that the Malaysian bank is not privy to this appeal, and therefore anything which I say in regard thereto will be obiter dictum. However, both counsel required of me certain guidance in the matter as apparently, there is some confusion as to what the proper procedure is generally and in the circumstances. That being the case, I shall venture to state my view. My view is that leave to E intervene is no more than a manner of speech. The Rules do not provide for intervention as such. Rather, under O 15 r 6(2)(b), a person not being a party but desirous of being one may apply for an order to be added as a party, but the sub-rule provides that no person shall be added as a plaintiff without his consent. As to the submission of counsel for the defendant that F a stranger to the proceedings seeking to get in should first obtain leave to intervene therein, I could find nothing in the Rules to support such a proposition. It is true that sub-r (2) does not stipulate who is entitled to make the application. However, by reference to sub-r (3) it is envisaged that any person is entitled to make it, and that will include a stranger to the proceedings whom the sub-rules by necessary implication embrace any G way. In this instance, the Malaysian bank was not a person seeking relief in respect of a right independent of the English bank, but rather relief in respect of the same right against the same party, namely, the defendant. In short, the Malaysian bank was seeking to step into the shoes of the English bank. The Malaysian bank to whom the right of action of the English bank H had been assigned or on whom it has devolved was seeking not merely to be added as a party, or to intervene so to speak, but to be plaintiff in the action. Accordingly, the Malaysian bank had to do no more than make an application under O 15 r 7(2) (again there is no restriction in the sub-rule as to who is entitled to make the application) for an order that the proceedings be carried on as if the Malaysian bank had been substituted I for the English bank, which it is believed is what it actually did, but the application was dismissed and against the dismissal there was no appeal. Another question in respect of which there is some uncertainty is whether in view of the order there is any necessity for either bank to make application

at all for substitution of the English bank, that the order in its terms abovestated speaks for itself, and that therefore, all the Malaysian bank needs to do is to file or produce the order in these proceedings where after it should be entitled to prosecute the action as the plaintiff. The order itself does not provide for such a procedure. As I see it, any person seeking relief from the court in its jurisdiction to try civil cases can only do so in accordance with the Rules, it being borne in mind that the Rules were made by the Rules Committee to regulate and prescribe the procedure and practice to be followed in the court. See ss 16 and 17 of the Courts of Judicature Act 1964.

I find myself unable to subscribe to the view that the English bank as from the transfer date ceased to have any rights in or in respect of this action and locus standi. Admittedly, as from the transfer date, the English bank ceased to have any rights or interest in the defined business as such. But certainly to my mind, the English bank had an interest and a right at all times to protect itself from liability arising from the consequences of such transfer. It seems to me that such a liability could arise in the realm of costs as long as the English bank remained a plaintiff in this action. Having divested itself of its rights including its rights in these proceedings in favour of the Malaysian bank, the English bank as long as it remains as plaintiff in this action, would be in jeopardy as to costs, seeing that by reason of the transfer of rights the Malaysian bank is *dominus litis* ,and the English bank is no more in control of the proceedings. It follows therefore, that the English bank has certainly a right and is well advised to take all proper steps immediately to remove itself as plaintiff in the proceedings, thus protecting itself from being mulcted in costs by reason of any possible act or default of the Malaysian bank relative to these proceedings. It follows therefore that the English bank did have locus standi to bring the application, seeking the order that it be substituted in these proceedings by the Malaysian bank. I might add that I could see nothing wrong in the English bank and the Malaysian bank making the application jointly.

The application insofar as it was brought by the Malaysian bank is to remain dismissed with costs. Insofar as the application was brought by the English bank, I order that the registrar's order be set aside to the extent only that the order constitutes a dismissal of the English bank's application for leave to amend the writ, that Standard Chartered Bank Malaysia Bhd be substituted for the plaintiff, and that there be no order as to the costs of the appeal.

Order accordingly.

Reported by Simon CK Chui